9.1.4 Elements of an ADA Claim — Harassment — Hostile Work Environment — Tangible Employment Action

Model

[Plaintiff] claims that [he/she] was subjected to harassment by [names] and that this harassment was motivated by [plaintiff's] [disability/request for accommodation].

[Employer] is liable for the actions of [names] in plaintiff's claim of harassment if [plaintiff] proves all of the following elements by a preponderance of the evidence:

First: [Plaintiff] has a "disability" within the meaning of the ADA;

Second: [Plaintiff] is a "qualified individual" within the meaning of the ADA;

Third: [Plaintiff] was subjected to [describe alleged conduct or conditions giving rise to plaintiff's claim] by [names].

Fourth: [names] conduct was not welcomed by [plaintiff].

Fifth: [names] conduct was motivated by the fact that [plaintiff] has a "disability," as defined by the ADA [or sought an accommodation for that disability].

Sixth: The conduct was so severe or pervasive that a reasonable person in [plaintiff's] position would find [plaintiff's] work environment to be hostile or abusive. This element requires you to look at the evidence from the point of view of the reaction of a reasonable person with [plaintiff's] disability to [plaintiff's] work environment.

Seventh: [Plaintiff] believed [his/her] work environment to be hostile or abusive as a result of [names] conduct.

Eighth: [Plaintiff] suffered an adverse "tangible employment action" as a result of the hostile work environment; a tangible employment action is defined as a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing significant change in benefits.

[For use when the alleged harassment is by non-supervisory employees:

Ninth: Management level employees knew, or should have known, of the abusive

conduct. Management level employees should have known of the abusive conduct if 1) an employee provided management level personnel with enough information to raise a probability of harassment on grounds of disability [or request for accommodation] in the mind of a reasonable employer, or if 2) the harassment was so pervasive and open that a reasonable employer would have had to be aware of it.**]**

[I will now provide you with more explicit instructions on the following statutory terms:

1. "Disability." — Instruction 9.2.1

2. "Qualified" — See Instruction 9.2.2]

Comment

In *Walton v. Mental Health Assoc. of Southeastern Pennsylvania,* 168 F.3d 661, 666 (3d Cir. 1999), the court considered whether a cause of action for harassment/hostile work environment was cognizable under the ADA. The court's analysis is as follows:

> The Supreme Court has held that language in Title VII that is almost identical to the . . . language in the ADA creates a cause of action for a hostile work environment. See *Patterson v. McLean Credit Union,* 491 U.S. 164, 180 (1989). In addition, we have recognized that:
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> > in the context of employment discrimination, the ADA, ADEA and Title VII all serve the same purpose--to prohibit discrimination in employment against members of certain classes. Therefore, it follows that the methods and manner of proof under one statute should inform the standards under the others as well. Indeed, we routinely use Title VII and ADEA caselaw interchangeably, when there is no material difference in the question being addressed.
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> *Newman v. GHS Osteopathic, Inc*., 60 F.3d 153, 157 (3d Cir. 1995). This framework indicates that a cause of action for harassment exists under the ADA. However, like other courts, we will assume this cause of action without confirming it because Walton did not show that she can state a claim.

The *Walton* court also noted that many courts "have proceeded on the assumption that the ADA creates a cause of action for a hostile work environment but avoided confirming that the claim exists." *See, e.g.*, *Wallin v. Minnesota Dept. of Corrections*, 153 F.3d 681, 687-88 (8th Cir. 1998) ("We will assume, without deciding, that such a cause of action exists."); *McConathy v. Dr. Pepper/Seven Up Corp*., 131 F.3d 558, 563 (5th Cir. 1998) (noting that various district courts have assumed the claim's existence and assuming its existence in order to dispense with appeal). District courts in the Third Circuit have also assumed, without deciding, that a claim for harassment exists under the ADA. *See, e.g., Vendetta v. Bell Atlantic Corp.*, 1998 U.S. Dist. LEXIS 14014 (E.D. Pa. Sep. 8, 1998) (noting that because the Supreme Court has read a cause of action for harassment into Title VII, the same is appropriate under the ADA). There appears to be no reported case holding that a harassment claim cannot be asserted under the ADA.

Accordingly, instructions are included herein to cover harassment claims under the ADA; these instructions conform to the instructions for harassment claims in Title VII and ADEA actions. See *Walton,* 168 F.3d at 667 ("A claim for harassment based on disability, like one under Title VII, would require a showing that: 1) Walton is a qualified individual with a disability under the ADA; 2) she was subject to unwelcome harassment; 3) the harassment was based on her disability or a request for an accommodation; 4) the harassment was sufficiently severe or pervasive to alter the conditions of her employment and to create an abusive working environment; and 5) that [the employer] knew or should have known of the harassment and failed to take prompt effective remedial action.").

If the court wishes to provide a more detailed instruction on what constitutes a hostile work environment, such an instruction is provided in 9.2.3.

It should be noted that constructive discharge is the adverse employment action that is most common with claims of hostile work environment. Instruction 9.2.4 provides an instruction setting forth the relevant factors for a finding of constructive discharge. That instruction can be used to amplify the term "adverse employment action" in appropriate cases.

The instruction's definition of "tangible employment action" is taken from *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

Respondeat superior liability for harassment by non-supervisory employees exists only where "the defendant knew or should have known of the harassment and failed to take prompt remedial action." *Andrews v. City of Philadelphia,* 895 F.2d 1469, 1486 (3d Cir. 1990). See also *Kunin v. Sears Roebuck and Co.,* 175 F.3d 289, 294 (3d Cir. 1999):

> [T]here can be constructive notice in two situations: where an employee provides management level personnel with enough information to raise a probability of sexual harassment in the mind of a reasonable employer, or where the harassment is so pervasive and open that a reasonable employer would have had to be aware of it. We believe that these standards strike the correct balance between protecting the rights of the employee and the employer by faulting the employer for turning a blind eye to overt signs of harassment but not requiring it to attain a level of omniscience, in the absence of actual notice, about all misconduct that may occur in the workplace.

The Supreme Court in *Harris v. Forklift Sys., Inc*., 510 U.S. 17, 21 (1993), explained that a hostile work environment claim has both objective and subjective components. A hostile environment must be "one that a reasonable person would find hostile and abusive, and one that the victim in fact did perceive to be so." The instruction accordingly sets forth both objective and subjective components.

Harassment as Retaliation for Protected Activity

In *Jensen v. Potter,* 435 F.3d 444, 446 (3d Cir. 2006), the court held that the retaliation provision of Title VII "can be offended by harassment that is severe or pervasive enough to create a hostile work environment." The *Jensen* court also declared that "our usual hostile work environment framework applies equally to Jensen's claim of retaliatory harassment."

The Third Circuit has not considered whether a retaliation-by-harassment claim is cognizable under the ADA. The *Jensen* court, in finding a retaliation-by harassment claim, focused solely on the retaliation provision of Title VII and did not consider the separate retaliation provision of the ADA. There is thus no direct authority for a retaliation-by-harassment claim under the ADA. But if the court finds that such a claim exists under the ADA, this instruction can be modified to accommodate the claim. Bracketed language in Instruction 5.1.4 (Title VII) is provided for a retaliation-by-harassment claim.

For further commentary on hostile work environment claims, see the Comment to Instruction 5.1.4.